A

SHORT EXPOSITION

OF THE

SETTLED LAND ACT

1882

(45 & 46 Vict. c. 38).

WITH AN INDEX.

BY

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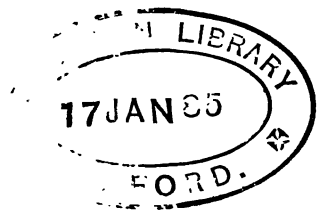
LONDON:

REEVES AND TURNER, 100, CHANCERY LANE,

Law Booksellers and Publishers.

1883.



LONDON:
PRINTED BY C. F. ROWORTH, BREAM'S BUILDINGS,
CHANCERY LANE.

THE greater part of the following remarks appeared in the "Solicitors' Journal," November, December, 1882. They have been in a great measure re-written, and have received large additions. It is hoped that they have not thereby been made less worthy of the reader's attention.

2, STONE BUILDINGS,
Dec. 21*st*, 1882.

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A

SHORT EXPOSITION

OF THE

SETTLED LAND ACT, 1882.

(45 & 46 VICT. c. 38.)

THE general intent of the Act may probably be summed up in a single sentence. It seems to aim at giving to every limited owner in possession of land full power to deal with the land in every way, as fully as it would be likely to be dealt with by a prudent and well-intentioned absolute owner in possession; and, while every facility is given for the making of those outlays upon which depends the well-being of the land and of those who live by it, many prudent precautions have been framed with a view to secure the fair distribution of all accruing benefits, and to preserve, as far as possible, the rights of persons interested as owners otherwise than in possession from loss or confiscation.

A great deal of what the Act proposes to make compulsory upon settlors is, and long has been, by custom voluntarily inserted into strict settlements of real property, with corresponding powers vested in the trustees of the settlement. It follows that a great feature of the Act's method is its transfer to tenants for life (who are the most common among limited owners in possession) of that initiative which has hitherto been exercised by trustees. It also follows that a great many rules for regulating the disposition of moneys raised by tenants for life are required to replace the general law relating to the duties of trustees.

It may be useful to glance briefly at the Acts which have been, to a certain extent, the precursors of the present one, and to note in outline the principal extensions of their policy. So far as the powers of leasing and ancillary powers conferred by the present Act upon tenants for life, and limited owners generally, are concerned, the Act may be regarded as an extension of the Settled Estates Act, 1877; and so far as the Act confers power to lay out money in making improvements upon the land, it may be regarded as an extension of the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114).* Of these previous Acts, only a small portion, not materially affecting their general working and design, is repealed; and the present Act does not seem to contemplate superseding them entirely. The Settled Estates Act, 1877, may still be resorted to, in cases where it is desired to grant an agricultural lease of settled land for a longer term than 21 years. The Improvement of Land Act, 1864, is expressly amended by sect. 30 of the present Act; the list of improvements contained in sect. 9 of the Act of 1864 being extended so as to comprise the more numerous items given in sect. 25 of the Settled Land Act. But the conditions imposed by the Act of 1864 upon landowners having limited interests who are desirous of effecting permanent improvements under the Act of 1864, were found in

* The operation of the Improvement of Land Act, 1864, has been somewhat enlarged by the following Acts:—(1.) The 34 & 35 Vict. c. 84, or the Limited Owners' Residences Act (1870) Amendment Act, 1871, repealing and re-enacting with amendments 33 & 34 Vict. c. 56, s. 3, provides that the erection, completion and improvement of a mansion-house and other usual buildings and offices, suitable to the estate, shall be improvements within the meaning of the Act of 1864. (2.) The 40 & 41 Vict. c. 31, or the Limited Owners' Reservoirs and Water Supply Further Facilities Act, 1877 (which is, perhaps, the most sesqui-pedalian *short title* hitherto invented by Parliament), similarly includes the construction or erection of reservoirs or other works of a permanent character for the supply of water. These Acts do not extend to Scotland.

practice to be so onerous that they have been little used. Application must be made to the Inclosure Commissioners (who will, after the end of this year, be merged in the Land Commissioners created by sect. 48 of the present Act); who may require security to be given beforehand for expenses to be incurred by them in submitting the application to an investigation of the most searching and rigorous kind. Notice of all proposed improvements must formerly have been given by advertisement; and various persons interested in the land had power to raise objections against them; but these provisions are repealed, as to England and Ireland, by the Settled Land Act. Large discretionary power of assenting to, or withholding assent from, improvements is of course vested in the Commissioners; and they, equally of course, felt themselves compelled, in order to avoid the danger of laxity, to lay down stringent rules which are, in practice, very hard to comply with. The proposed works cannot be commenced until detailed specifications and plans have been approved. The scheme thus outlined is carried into effect by a costly and troublesome machinery of provisional and absolute orders; and the only method provided for recouping the cost of a successful and successfully carried out application, is the creation of a rent-charge upon the land. The main provisions of the Act of 1864, may be summed up by saying that a limited owner, if willing to incur a good deal of expense and a much vaster amount of trouble and annoyance, might under its provisions raise money by what was practically the sale of a rent-charge, and, subject to onerous responsibilities, might expend the money so raised upon any of the objects specified in its sect. 9. These objects are much less numerous than those specified in sect. 25 of the Settled Land Act.

That the rules laid down by the commissioners who

were responsible for the practical working of the Act of 1864 should have been exceedingly strict, will not appear surprising when it is remembered that, by sect. 59 of that Act, the charges created under its provisions are an absolute first charge upon the land, ranking among themselves in order of their respective dates, but taking priority over all existing claims and incumbrances whatsoever, except rents and charges incident to the tenure, and tithe rent-charge. The justification of this strange enactment is generally understood to be grounded upon the supposition, that the works authorized by the Act are such as must necessarily increase the value of the security; and this justification imposed upon the Commissioners an obligation (which they amply discharged) to observe the most vigilant severity. If the Act had been very extensively used in practice, it might not improbably have materially increased in many cases the difficulty of borrowing money upon an ordinary mortgage. The Settled Land Act gives much larger facilities for action in all other respects, but it allows no tampering with estates, interests, and charges having priority to the settlement under which arises the right of the person who exercises the powers of the Act. (See sect. 20.)

The principal points in which, so far as the capacity to effect improvements is concerned, the plan of the Settled Land Act differs from that of its predecessor of 1864, seem to be as follows:—Under the new Act the limited owner may in general take action without any application to, or permission from, the Commissioners or the Court; the means placed at his disposal for raising the required money are much simpler and more extensive; the modes in which the money, when raised, may be employed, are more numerous; and the conditions subject to which such moneys may be so employed are much less onerous to observe and perform.

Nevertheless it seems to be the general opinion that due provision is made by the Act for the protection of the interests of the other persons entitled in succession to the limited owner by whom the powers of the Act are exercised. It is very probable that the protection afforded to the interests of the persons entitled in succession, could not have been made more stringent without much risk of defeating the whole purpose of the Act.

It may be remarked that the Act of 1864 extends to Scotland, while the Settled Land Act does not. By sect. 30 of the Settled Land Act, the more extensive list of authorized improvements contained in its sect. 25 is read into sect. 9 of the former Act; so that Scottish limited owners will obtain, though upon more onerous terms, a part of the further benefits conferred by the present Act upon limited owners in England and Ireland. Those parts of the Act of 1864, which are repealed by the Settled Land Act as to England and Ireland, are not repealed as to Scotland.

The operation of the Act commences immediately after the 31st December, 1882; but its operation extends to all settlements, whether executed before or after its commencement.

The subjects to be considered in relation to the Act seem to be divisible into the following principal heads:—

(I.) Who may exercise the powers given by the Act?

(II.) What may be done in exercise of those powers?

(III.) In what ways may capital money arising from the exercise of any of those powers be employed?

(IV.) What securities are provided against extravagant and reckless dealing by limited owners with what does not belong to them?

(I.) The Persons by whom the Powers of the Act may be exercised.

The person who is intrusted by the Act with the exercise of the powers which it confers, is habitually styled throughout the Act "the tenant for life;" under which general term are included the following particulars:—

(1.) Any person who is for the time being under a settlement beneficially entitled for his life to the receipt of the income of the settled land. See sect. 2, sub-s. (5) and sub-s. (10), (i.). This seems to include legal and equitable tenants for life under a settlement, as distinguished from persons merely holding at a rent under leases for life or lives. Where the settled land is subject to a trust for sale, the case is specially provided for by sect. 63.

(2.) A tenant in tail in possession, although restrained by statute from barring the entail, and although the reversion is in the Crown; but not in case the land in respect whereof he is restrained from barring the entail was purchased with money provided by Parliament in consideration of public services. See sect. 58, sub-s. (1).

By virtue of sect. 2, sub-s. (10), (i.), this provision seems to apply to equitable as well as to legal tenants in tail.

The following remarks will explain the foregoing enactment:—

By the 34 & 35 Hen. 8, c. 20, tenants in tail of lands whereof the reversion or remainder is in the Crown are prevented from barring the entail; and such tenants in tail are at the present day disqualified to bar the entail, by 3 & 4 Will. 4, c. 74, s. 18.

A peerage is a tenement capable of being entailed (though only by the act of the Crown); and most peerages now existing are in fact held in tail male. Parliament has sanctioned many settlements of lands

effected by private Acts; most of them being made with the object of securing a perpetual union between certain peerages and the lands belonging to their owners by inheritance. Tenants in tail under such parliamentary settlements are usually restrained, by a special clause inserted for the purpose, from barring the entail.

The parliamentary settlements last mentioned are voluntary settlements of inherited estates, made upon the petition of the owner for the time being. This distinguishes them from settlements made by Parliament (of which Blenheim is generally understood to be an example) of lands originally given by way of a national reward, and settled accordingly. The fact that the last-mentioned settlements only are exempted from the operation of the Act seems to indicate some suspicion on the part of the Act's promoters that its operation, however carefully guarded, is not wholly without danger to the stability of settlements.

(3.) A tenant in fee simple in possession, with an executory limitation over, on failure of his issue, or in any other event. (Sect. 58, sub-s. 1.) This provision seems to apply to an equitable tenant. The reader will remember that, by sect. 10 of the Conveyancing Act, 1882, an executory limitation over on default or failure of issue, if created by an instrument coming into operation after the 31st December, 1882, will become void so soon as any of the specified issue shall have attained the age of twenty-one years.

(4.) A person entitled in possession to a base fee, although the reversion is in the Crown. (*Ibid.*)

This provision also seems to apply to a person equitably entitled.

(5.) A tenant in possession for years "determinable *on life*"—an extraordinary phrase, which seems to mean, determinable upon the dropping of a life or lives—not holding merely under a lease at a rent. (*Ibid.*)

This provision also seems to apply to an equitable tenant.

(6.) A tenant in possession *pur autre vie*, not holding merely under a lease at a rent. (Sect. 58, sub-s. 1.)

This provision also seems to apply to an equitable tenant.

(7.) A tenant in possession for life or *pur autre vie*, or for years "determinable on life," whose estate is liable to cease in any event during that life, or is subject to a trust for accumulation of income for payment of debts "or other purpose." (*Ibid.*)

This provision also seems to apply to an equitable tenant.

The language here used by the Act to express the methods by which the estate may be made "liable to cease *in*" (*i. e.*, upon the happening of) "any event during that life," is as follows:—"Whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by *conditional limitation*, or otherwise, or to be defeated by an *executory limitation*, gift, or disposition over." The phrase "conditional limitation" is used so differently by different writers, that nothing but obscurity is likely to result from its use. We may conjecture, with some plausibility, that it is here restricted to signify a determinable limitation at common law, by which an estate defined by direct limitation is made liable to cease upon the happening of a future event. The word more commonly bears a more extensive meaning, including also, among other things, executory limitations.

(8.) A tenant in tail in possession after possibility of issue extinct. (*Ibid.*)

This provision also seems to apply to an equitable tenant.

Such a tenant can exist only as a developement of a tenant in special tail; when a gift has been made in tail

to a donee and the heirs of his (or her) body by a specified wife (or husband), or to two donees and the heirs of their joint bodies, after the death, in the former case, of the specified wife (or husband), or in the latter case, after the death of one of the two donees. Such gifts in special tail were anciently a common form of settlement; but it is not probable that estates in special tail now ever occur in practice.

(9.) A tenant by the curtesy (*Ibid.*); including, it is conceived, a tenant by equitable curtesy. The propriety of including such tenants is not affected by the question, whether tenancy by the curtesy will be gradually abolished by the operation of the Married Women's Property Act, 1882; because such abolition, even if (which is exceedingly doubtful) it be destined to occur, will only be gradual.

The language of the Act habitually contemplates the existence of a settlement, and of an actual tenant for life under its provisions; which conditions are not in fact fulfilled by the cases, now under consideration, of persons who, not being tenants for life, have the powers of tenants for life. In order to adapt the general circumstances of these cases to the general language of the Act, the following provision (sect. 58, sub-s. 2) has been inserted:—

"In every such case, the provisions of this Act referring to a tenant for life, either as conferring powers on him or otherwise, and to a settlement, and to settled land, shall extend to each of the persons aforesaid, and to the *instrument under* which his estate or *interest arises*, and to the *land therein comprised*."

It seems to have been overlooked, that the estate of a tenant by the curtesy does not arise under any instrument; but, when the curtesy is legal, under the common law, and, when the curtesy is equitable, under the practice of the Court of Chancery, which has been bequeathed to the High Court of Justice. If the language of the Act is to be strictly interpreted, there

will exist no land over which the powers conferred by the Act upon a tenant by the curtesy can be exercised.

(10.) A person entitled to the income of land under a trust for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale, or until forfeiture on bankruptcy, "or other event." (*Ibid.*). This seems to be an amplification and extension of equitable tenants for life; who seem, as above mentioned, to be, by virtue of sect. 2, sub-s. (10), (i.), included within the provisions of sect. 2, sub-s. (5). It seems to have been added out of abundant caution, first, to secure to equitable tenants for life the right to exercise the powers conferred by the Act; and secondly, that equitable tenants for life or *pur autre vie*, having estates made liable to cease by determinable limitation, shall be included, for the purposes of the Act, under the phrase "tenant for life." Legal estates thus determinable are, apart from this enactment, estates for life, or *pur autre vie*, in contemplation of law. If the provision is not (as it seems to be) superfluous with regard to estates for life, a similar provision would seem to be needed in the case of estates tail and base fees; which, as well as estates for life, admit of being made liable to cease by determinable limitation.

(11.) The trustees of the settlement, if any, and otherwise such person as the court shall appoint, in case the "tenant for life" is an infant. (Sect. 60.) This provision also applies to the case of an infant who is entitled in his own right to possession of land, apparently for any estate whatsoever, whether legal or equitable, and not being entitled under a settlement. (Sect. 59.) The provision probably affords the principal reason for the inclusion of a tenant in tail in possession among the persons to whom the powers of "tenant for life" are given. It is probable that infant

tenants in tail are more frequently met with in practice than tenants in tail who are incapacitated, otherwise than by infancy, from barring the entail.

The Act defines the sense in which it uses the phrase "trustees of the settlement;" but its language is not always uniform, and it seems sometimes to show an intention to depart from its definition. The following propositions may be collected from different passages:—

(i.) If under the settlement there exist any trustees "with power of sale of settled land, or with power of consent to, or approval of, the exercise of such a power of sale," then such trustees "are for purposes of this Act trustees of the settlement." (Sect. 2, sub-s. 8.) This seems to be the most general sense of the phrase.

(ii.) If under the settlement there are no such trustees as aforesaid (but, apparently, not if there are), any persons may be by the settlement "declared to be trustees thereof for purposes of this Act." (*Ibid.*)

(iii.) If at any time there are no trustees within the foregoing definition, or when "in any *other* case" it is expedient that *new trustees* should be appointed, the Court may, on the application of any person having under the settlement any interest in the settled land, or, in the case of an infant, on the application of his guardian or next friend, appoint "fit persons to be *trustees under the settlement* for purposes of this Act." (Sect. 38.)

(iv.) It seems that where an infant would, if of full age, have the powers of a tenant for life, and there are no "trustees of the settlement," the Court may, without appointing trustees, appoint a "person" to exercise the powers conferred by the Act, either generally or in such manner as the Court in the particular instance orders. (Sect. 60.)

(12.) A married woman and her husband together, in any case where the married woman, if not married,

would have been "tenant for life," and is not entitled either for her separate use, or under any statute for her separate property or as a *feme sole*. (Sect. 61.) If entitled to her separate use, or under any statute as aforesaid, the married woman has power to act without her husband; and notwithstanding that she is restrained from anticipation. (*Ibid.* sub-s. 6.)

(13.) The committee of a lunatic tenant for life, so found by inquisition, acting under an order of the Lord Chancellor or other person intrusted with the care, &c. of lunatics. (Sect. 62.)

Several persons entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, constitute together only one "tenant for life." (Sect. 2, sub-s. 6.)

It would seem that by virtue of this last provision the consent of the trustees appointed by the settlement, or of any other person or persons, might be made necessary to the exercise, by the person who would otherwise have been the tenant for life, of any of the powers conferred by the Act. Such trustees, or other persons, would only need to be entitled, for some concurrent estates or interests, with the person intended in other respects to occupy the position of tenant for life: their interests being of course very small. It could hardly be contended that such an arrangement is forbidden by the language of sect. 51.

This seems to exhaust the list of persons empowered by the Act to take the initiative.

A person who is tenant for life within the meaning of sect. 2, sub-ss. (5) and (6), is "deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent." (Sect. 2, sub-s. 7.)

It appears from sect. 50, sub-s. (1), that this provision

applies also to the other persons above enumerated, who, not being in fact tenants for life, "have the powers of a tenant for life under this Act." (Sect. 58, sub-s. 1.)

As above mentioned, the provisions of the Act apply to all settlements, whether executed before or after its commencement. (Sect. 2, sub-s. 1.) The policy of transferring the initiative from the trustees, by whom it has hitherto been commonly exercised, to the tenant for life, is so rigorously carried out, that no settlor can now empower his trustees to exercise, without the consent of the tenant for life, any power exerciseable for any purpose provided for in the Act. (Sect. 56, sub-s. 2.)

(II.) What Powers may be exercised under the Act.

Having given some account of the persons by whom the powers conferred by the Act may be exercised, the next point is to consider the nature of the powers themselves, and the restrictions placed upon their exercise, not including under this phrase the special precautions taken by the Act for the protection of the rights and interests of remaindermen, which subject will be considered separately.

(1) *Sale.*

The tenant for life, including any of the persons in that behalf previously enumerated, may sell the settled land, or any part thereof, or any *easement*, right, or privilege of any kind, *over* or *in relation to* the same. (Sect. 3, sub-s. i.)

But the principal mansion-house, and the demesnes thereof, and other lands usually occupied therewith, cannot be sold (or leased) without the consent of the trustees of the settlement, or an order of the Court. (Sect. 15.)

A question has already been raised in practice, having reference to the future exercise of the above-cited power of sale, so soon as the Act shall come into operation, by a tenant for life under an existing settlement. What is the full meaning of the *sale* of an easement *over or in relation to* certain specified land? It doubtless includes power to *grant* for valuable consideration a *future* easement, in respect to which the specified land shall be the servient tenement; but it by no means obviously includes power to *release* for valuable consideration the enjoyment of an *existing* easement, in respect to which the specified land is the dominant tenement. Suppose the case of the erection of costly buildings in a crowded neighbourhood, which occupy the site of a former building having certain ancient lights; and that the windows in the new building do not tally in size and situation with the old ones. The neighbouring owners may be willing to execute a grant of the new lights in return for the legal extinction of the right to the old lights; but it may easily happen, by reason that the fee simple of the site of the new buildings is in strict settlement, that nobody is competent under the existing law to execute a release of the latter. Will the tenant for life under the settlement acquire such power upon the 1st of January next? If not, a power seems to have been omitted from the Act which might profitably have been inserted.

The language above cited seems to be extremely ill adapted to include such a power. Moreover, it exactly follows the language of sect. 6 respecting the leasing of an easement, which is as follows:—

> "A tenant for life may lease the settled land, ... *or any easement, right, or privilege of any kind, over or in relation to the same,* . . . . for any term," &c.

It would be impossible, or at least very difficult, to contend that the above-cited power of leasing authorizes

the suspension, during a term, of an easement enjoyed by the settled land as dominant tenement; and since in its form of language the power of leasing is identical with the power of sale, this seems to be a strong argument against supposing that the power of sale authorizes the release in perpetuity of such an easement.

(2) *Release of Tenure, and Enfranchisement.*

Where the settlement comprises a manor, the tenant for life may *sell* the *seignory* of any *freehold land* within the manor, or the *freehold and inheritance* of any *copyhold* or customary land, parcel of the manor, with or without the minerals and mining rights, so as, *in every such case*, to effect an *enfranchisement*. (Sect. 3, sub-s. ii.)

The first part of this somewhat strange language seems to mean, that the tenant for life of a manor may release chief rents and other services incident to the tenure, and may also release the tenure itself, so as to extinguish the tenure and sever from the manor any lands to which it relates. The word "sell" seems, in its proper use, to imply that something passes from the vendor to the purchaser; but, under such circumstances as above supposed, the seignory is capable of nothing but extinction.

The latter part of the above-cited language seems to contemplate what is commonly called the enfranchisement of copyholds and customary freeholds. The last words, "so as, in every such case, to effect an enfranchisement," can only apply to these, not to cases in which the seignory appertains to freeholds; which latter, of course, neither require nor are susceptible of "enfranchisement." The language of 21 & 22 Vict. c. 94, s. 7, seems to have been more judiciously framed.

An enfranchisement may be made with or without a regrant of any right of common or other right, easement or privilege theretofore held or enjoyed with the land enfranchised. (Sect. 4, sub-s. 7.) The object of

this enactment will sufficiently appear from the following passage:—"The right of common in the wastes of the lord of the manor is extinguished by enfranchisement, unless specially preserved to the copyholder under terms equivalent to a regrant of common; and it has been held that the grant of all *appurtenances* to the copyhold tenement will not prevent the destruction of the common; it is therefore usual to insert a regrant of the commonable rights in the deed of enfranchisement." (Scriv. Cop. 4th ed. 556.)

But an enfranchisement effected under the 4 & 5 Vict. c. 35 (see sect. 81) will not deprive the tenant of any commonable right to which he may be entitled.

(3) *Exchange.*

The tenant for life may make an exchange of the settled land, or any part thereof, for other land, including an exchange in consideration of money paid for equality of exchange. (Sect. 3, sub-s. iii.)

The last part of this provision seems to signify, that the transaction may be either in the nature of an exchange, properly so called, or may be in the nature of a purchase of land, made for a consideration composed partly of land and partly of money. It may also be inferred from some other passages in the Act, that in the latter case the equality money may be either paid or received, as the case may require, by the tenant for life. Sect. 21, sub-s. (iv.), provides that capital money "arising under this Act," may be applied, among other things, "in payment for equality of exchange"; and sect. 18 provides that, where money is required, among other things, "for equality of exchange," the tenant for life may raise it by mortgage. This shows that the tenant for life may *pay* equality money. Sect. 4, sub-s. (2), which provides that every exchange shall be made for the best consideration in land, or in land *and money*, seems to

show that the tenant for life may *receive* the equality money upon an exchange.

Settled land in England cannot be given in exchange for land out of England. (Sect. 4, sub-s. 8.) If the settlement should contain a power to effect such exchanges, they might, of course, be effected under the power, though not under the Act.

It is a circumstance to be remarked, that the restriction imposed on the powers of sale and leasing with regard to the principal mansion-house, &c., is not imposed upon the power of exchange.

(4) *Partition.*

Where the settlement comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares, the tenant for life may concur in making partition of the entirety, including a partition in consideration of money paid for equality of partition. (Sect. 3, sub-s. iv.)

It seems, for reasons similar to those above given with reference to the case of an exchange, that the tenant for life may either pay or receive money for equality of partition. (See sect. 18, and sect. 4, sub-s. 2.) There can be little doubt that the two cases (1) where the settlement comprises an undivided share of land, and (2) where, under the settlement, the settled land has come to be held in undivided shares, ought to have been treated separately. As the matter stands, since, by virtue of sect. 2, sub-s. (6), several persons entitled for concurrent estates or interests constitute only one tenant for life, it is not clear that, in the latter case, the tenant for life of each separate undivided share will have, in relation to that share, the same powers with regard to partition as he would have had if that share had originally been solely comprised in the settlement, so as to be, in the phraseology of the Act, "the settled

land." This was perhaps the intention of the draftsman; but the plain grammatical meaning of the language used seems to be something quite different.

Money required for enfranchisement, or for equality of exchange or partition, may be raised by mortgage; (sect. 18). These are the only purposes for which mortgages to be made by the tenant for life, as such, are authorized by the Act. Sect. 47 provides that costs directed by the Court to be paid out of property subject to a settlement, may be raised and paid by means of a mortgage of the settled land, or any part thereof, to be made by such person as the Court directs.

(5) *Shifting of Incumbrances.*

By sect. 5 the tenant for life is empowered, with the consent of the incumbrancer, to charge an incumbrance affecting land sold, or given in exchange, or on partition, on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold, or so given; and, "by conveyance of the fee simple, or other estate or interest, the subject of the settlement, or by creation of a term of years in the settled land, *or otherwise, make provision accordingly.*" The words between inverted commas seem to mean that the tenant for life may convey the "other part," for any estate or interest not exceeding the whole estate or interest comprised in the settlement, to the incumbrancer by way of mortgage to secure payment of his claims under the incumbrance.

Land purchased with capital money "arising under" the Act may be made a substituted security for any charge in respect of money actually raised, and remaining unpaid, from which the settled land, or any part thereof, or any undivided share therein, has been released on the occasion and in order to the completion of a sale, exchange, or partition. (Sect. 24, sub-s. 4.)

Here the word "charge" seems to be used somewhat ambiguously, to denote both the new charge to be created and the old charge which has been released. The substitution may be effected only in cases where the land which is to be subject to the substituted charge has been acquired either by purchase with money arising from a sale of land which was before the sale subject to the charge, or by the exchange or partition of land which (or an undivided share of which) was previously subject to the charge. (*Ibid.*, sub-s. 5.)

(6) *Leases.*

A tenant for life may lease the settled land, or any part thereof (but not the principal mansion house and demesnes, &c., except by consent of trustees or by order of Court), or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, on building lease for any term not exceeding ninety-nine years; on mining lease, for any term not exceeding sixty years; and on any other kind of lease, for any term not exceeding twenty-one years. (Sect. 6.)

And with permission of the Court, to be given under special circumstances, a building or mining lease may be made for any term, or may be granted in perpetuity. (Sect. 10.)

The enlarged powers given by such an order may, subject to any direction to the contrary contained in it, be exercised by each of the successors in title, having the powers of tenant for life, of the person in whose favour it was originally made. (*Ibid.*, sub-s. 2.)

Various provisions are made to secure the proper exercise of the powers of leasing, of which the following is a brief account (sect. 7):—

(a) Every lease must be by deed, to take effect in possession not more than twelve months from the date;

(b) And must be at the best rent, regard being had to any fine taken and other circumstances;

(c) The lessee must covenant to pay the rent, with a condition of re-entry upon default for a time not exceeding thirty days;

(d) A counterpart must be "executed by the lessee *and delivered to the tenant for life;*" of which execution and delivery the execution of the lease by the tenant for life shall be sufficient evidence. (Sect. 7, sub-s. 4.) The Conveyancing and Law of Property Act, 1881, sect. 18, sub-s. 8, contains, under similar circumstances, the additional words, "in favour of the lessee and all persons deriving title under him." It is not improbable that these words will be imported into the present enactment.

The other provisions contained in sects. 7—9 are not in the nature of precautionary restrictions, and do not require any particular mention; unless to remark that one of them, the power to grant building leases at a pepperoorn rent for the first five years of the term (sect. 8, sub-s. 2), which presents a very startling appearance when imported by the Conveyancing Act into a *mortgage*, and conferred upon the *mortgagor*, seems to be free from objection when imported by the present Act into a settlement, and conferred upon the tenant for life.

(7) *Confirmation of Contracts.*

By sect. 12 a tenant for life is empowered to make leases (i.) to give effect to a contract for a lease entered into by any of his predecessors in title, where such lease, if made by the predecessor, would have bound the successors in title; (ii.) to give effect to a covenant for renewal, performance whereof could be enforced against the owner for the time being of the

settled land; and (iii.) to confirm, "as far as may be, a previous lease, being void or voidable; but so that every lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted, under this Act or otherwise, as the case may require." (Sub-s. 3.)

It may be doubted whether this section is not superfluous. The last part of the clause between inverted commas is perhaps somewhat obscure. It seems to import, that both the maker of the voidable lease, and also the person confirming it, shall, at the dates of their respective acts, be entitled to grant the lease as its terms stand at the time of confirmation. In such a case it is easier to see how the lease might be void, than how it could be merely voidable.

(8) *Surrenders of Leases.*

By sect. 13 a tenant for life is empowered to accept, with or without consideration, a surrender of any lease, whether made under the Act or not; and such surrender may relate to the whole, or any part, of the land comprised in the lease. On a partial surrender, the rent may be apportioned; and on the grant of a new lease, the value of the lessee's interest under the surrendered lease may be taken into account in fixing the rent.

(9) *Licences to lease Copyholds.*

By sect. 14, a tenant for life of a manor comprised in the settlement, is empowered to license the copyholders to make any such leases of their copyhold lands "*as the tenant for life is by this Act empowered to make of freehold land.*"

A copyholder cannot, except by special custom of the manor, lease his copyhold for a longer term than a year

without a licence in that behalf from the lord. Any attempt to lease for a longer term operates a forfeiture.

It will be seen that, as regards manors which are not comprised in the settlement, the Act shows an intention to avoid encroaching on the rights of the lord, so far as the settlement may comprise copyholds of such manors. The leasing powers of the tenant for life of lands seem to extend only to freeholds, not to copyholds. The words above placed in italics seem to supply the first indication given by the Act of this restriction. A restriction of such importance ought to have been much more clearly expressed; if, indeed, it can be said to have been expressed at all. The inference as to the existence of the restriction seems also to follow, though not too obviously, from some of the language of sect. 20. That section deals with the general question of the validity of conveyances and leases made in pursuance of the Act; and sub-s. (2), (i.), provides that these shall be subject to "all *estates, interests, and charges* having priority to the settlement." These words will probably be held to include the rights of the lord in relation to copyholds, though they are not very well adapted to the purpose.

(10) *Appropriation of Streets, &c.*

Sect. 16 empowers the tenant for life, in connection with a sale or grant or lease for building purposes, to cause or require to be appropriated and laid out, for the general benefit of the residents on the settled land, any parts thereof for streets, gardens, &c., with drains, fencing, paving, or other works necessary or proper in connection therewith; and also empowers him to make arrangements for their continued repair and maintenance.

Deeds executed for giving effect to this section may be inrolled in the Central Office of the Supreme Court. The reader will remember that sect. 2 of the Con-

veyancing Act, 1882, which makes provision for official searches in the Central Office, does not apply to deeds inrolled under any statute.

(11) *Timber.*

A tenant for life, impeachable for waste in respect of timber, may, on obtaining the consent of the trustees of the settlement, or an order of the Court, cut and sell "timber ripe and fit for cutting." (Sect. 35.)

Since one quarter of the net proceeds of sale are allowed by the Act to go as rents and profits, it is obvious that a tenant for life, impeachable for waste, ought not to be left to his own unassisted opinion as to what timber on the land is "ripe and fit for cutting." It is not equally obvious why the tenant for life under such circumstances should receive this gratuitous present out of the pocket of the remainderman, instead of getting only what belongs to him under the existing law—viz., the annual dividends of any investments representing the money; or getting what he might obtain by a judicious exercise of the powers of the Act—viz., the increased income resulting from judicious application of the money in improvement of the land.

A similar gift (perhaps more reasonably) is made in respect of moneys received as mining rents, where the tenant for life is impeachable for waste in respect of minerals. (See sect. 11.)

The meaning of the epithets "ripe and fit for cutting," as applied to timber, has not yet been ascertained with exact precision, and some difficulty may perhaps be experienced in practically interpreting this provision.

(12) *Contracts.*

Sect. 31, with considerable minuteness of detail, and in very perplexed language, empowers a tenant for

life to make, vary, or rescind, with or without consideration, and accept surrenders of, contracts for carrying into effect any of the purposes of the Act.

(13) *Sale of Quasi-heirlooms.*

The tenant for life of land, with which personal chattels devolve under a trust, may, on obtaining an order of the Court, sell such chattels. (Sect. 37).

Such chattels are often, but improperly, styled heirlooms. They would vest absolutely in the first tenant in tail who becomes entitled in possession to the land. The money arising from their sale may be invested in other chattels to be held upon the same trusts; but, unless this is done, the money is treated as capital money arising in any other way (*Ibid.* sub-s. 2), and the peculiar interest of the first tenant in tail so becoming entitled is not specially protected.

A tenant for life whose interest relates to an undivided share of land may concur with any person having power to dispose of any other undivided share, "in any manner and to any extent necessary or proper for any purpose of this Act." (Sect. 9.) This provision is applicable, whether the undivided share was originally comprised in the settlement, or, under the settlement, the settled land has come to be held in undivided shares. The language of this section is much clearer than that of sect. 3, sub-s. (iv.); upon which some remarks are made above (p. 21).

Sect. 45, sub-s. (1), provides that a tenant for life, when intending to "make a sale, exchange, partition, lease, mortgage, or charge," shall give a month's notice of his intention to each of the trustees of the settlement severally, and also to the *solicitor to the trustees*, if any such solicitor is known to him. Some observations upon this provision will be found at p. 41.

Persons dealing in good faith with the tenant for life

are not concerned to enquire respecting the giving of any such notice.

(14) *Powers of Tenant for Life not assignable.*

The Act has done its best to prevent the tenant for life from being, either by his own act or by the act of anyone else, deprived of the powers which it confers upon him. By sect. 50 it is provided that these powers shall not be capable of assignment (including assignment by operation of law) or release; and that they shall remain exerciseable by the tenant for life, after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement. And any contract by tenant for life not to exercise any of the powers is void. (*Ibid.* sub-s. 2.) Some doubt may, perhaps, be felt whether the powers in question ought to be exerciseable by a bankrupt tenant for life. But the provision seems to be quite in accordance with the general policy of the Act; which is, in fact, not to protect settlements, but to relax them so far as was thought by its authors to be necessary for the public good. If the tenant for life has assigned his interest for value, he cannot exercise the powers to the prejudice of the assignee (*Ibid.* sub-s. 3); but, unless the assignee is in possession, his consent is not necessary to the making of leases, provided they be made at the best rent reasonably obtainable and without fine, and are in other respects in conformity with the Act, Sects. 51 and 52 make void any provision contained in a settlement, by which any attempt is made either to restrain the tenant for life from exercising the powers, or to punish him for their exercise by forfeiture. But in exercising the powers the tenant for life is, as regards the other parties entitled under the settlement, generally subject to the duties and liabilities of a trustee. (Sect. 53.)

It is believed that the foregoing account will be found to exhaust the list of means open to a tenant for life, whereby, under the powers conferred by the Act, moneys, whether regarded as capital money or as income, can be raised by the tenant for life. To moneys which come under the head of income, he is of course entitled during his tenancy. The next subject for consideration is the division of moneys into capital money and income, and the methods in which the former may be employed under the Act.

(III.) Of Capital Money, and the Modes in which it may be applied.

In the administration of the trusts of every settlement the salient division of money subject to the trusts of the settlement is into capital money and income, or rents and profits; and it follows, *ex vi termini*, that the person (whether an individual, or an aggregate of individuals) whose estate or interest is, for the time being, the estate or interest in possession, is entitled to the income. Questions relating to the conflicting interests of persons entitled in possession, and persons entitled in remainder or reversion, arise only in respect to capital money; and the question, whether any specified sum is to be treated as capital or income, or how the apportionment between them, if any, is to be made, does not always admit of an obvious solution. It is remarkable that, although a detailed definition was contained in the Bill, as originally introduced, the Act contains no general definition of capital money; unless the following remark, contained in sect. 2, is to be styled a definition:—

"(9.) Capital money arising under this Act, and receivable for the trusts and purposes of the settlement, is in this Act referred to as capital money arising under this Act."

This certainly adds nothing appreciable to our means of answering the question, whether in any specified case certain moneys are to be treated as capital or as income.

In certain special cases, it is specially declared by the Act that certain moneys are capital money :—

Money raised by mortgage by virtue of sect. 18, to provide for enfranchisement or equality of exchange or partition, "shall be capital money arising under this Act." This enactment tends rather towards obscurity than enlightenment; for it appears that such moneys are not, in fact, capital money in the general sense of the term, but only for the special purposes mentioned in that section.

When capital money has been invested in authorized securities, the latter "may be converted into money, which shall be capital money arising under this Act." (Sect. 22, sub-s. 7.)

Consideration moneys received for the variation or rescission of contracts, by virtue of sect. 31, "shall be capital money arising under this Act." (Sub-s. ii.).

Money paid into Court under any statute, and liable to be laid out in the purchase of land to be made subject to a settlement, "may be invested or applied as capital money arising under this Act." (Sect. 32.)

Money in the hands of trustees and liable to be laid out as last aforesaid, may, at the option of the tenant for life, be invested or applied as capital moneys arising under this Act. (Sect. 33.)

The Act by its language seems also to assume that purchase-money paid in respect of a lease or any interest less than a fee simple, or of a reversion, is "capital money arising under this Act." (See sect. 34.) But in making this

assumption, it provides that capital money so arising may be invested in a peculiar manner not applicable to capital money in general. The trustees or the Court may require it to be so "laid out, invested, accumulated, and paid," as to give the parties interested the like benefit as they might lawfully have had from the lease, or as near thereto as possible.

Moneys arising by the sale of chattels settled upon trust to devolve with land, "shall be capital money arising under this Act." (Sect. 37.)

In two particular cases, as has been already mentioned, the Act distinguishes between capital and income for the purpose of apportioning a fund —namely, as to rents arising under mining leases, and as to the net proceeds of the sale of timber. As to mining rents, if the tenant for life is impeachable for waste in respect of minerals, three-fourths, and otherwise one-fourth, must, unless a contrary intention is expressed in the settlement, be set aside as capital. (Sect. 11). As to the net proceeds of the sale of timber, if the tenant for life is impeachable for waste in respect of timber, three-fourth parts must be set aside as capital. (Sect. 35, sub-s. 2.) It is to be inferred that, in the case of a tenant for life not impeachable for waste in respect of timber, the Act does not intend to interfere with his right to cut such timber without obtaining for the purpose any permission, and to treat the proceeds as income.

It seems to follow that, except in the few cases specially provided for, these questions must be determined upon the analogy of the general rules laid down by equity in administering the trusts of settle-

ments; and, in general, that moneys arising by the exercise of any of the powers conferred by the Act, will be treated as capital moneys in all cases in which, if they had arisen by the exercise of similar powers delegated by the settlement to the trustees, they would have been treated as capital moneys.

The following is a list of the different means by which it seems probable that capital moneys may "arise under the Act," arranged in the order in which they occur in the Act; including both those which are specially provided for, and those which seem to depend upon the general principles regulating the administration of settlements.

(1.) Net purchase-moneys received on a sale, whether of the whole or any part of the settled land, or of an easement, &c., "over or in relation to" the settled land, by virtue of sect. 3, sub-s. (i.).

This will, of course, include purchase-moneys of the principal mansion-house and demesnes, whenever they are sold with the consent of the trustees, or by an order of the Court. (Sect. 15.)

(2.) Consideration moneys received for the enfranchisement of copyholds, and the release of the tenure (with its incidents) of freeholds, by virtue of sect. 3, sub-s. (ii.).

(3.) Moneys received for equality of exchange (sect. 3, sub-s. iii.);

(4.) Or received for equality of partition. (Sect. 3, sub-s. iv.)

(5.) Fines or premiums taken on the grant of leases, by virtue of sects. 6—13; including fines and premiums taken upon the completion of a contract, or confirmation of a voidable lease, by virtue of sect. 12.

(6.) Three-fourths of the net moneys arising under mining leases, if the tenant for life is impeachable for

waste in respect of minerals (sect. 11); unless a "contrary intention" is expressed in the settlement.

(7.) One-fourth of the net moneys arising under mining leases, if the tenant for life is not impeachable for waste in respect of minerals (*ibid.*); unless a contrary intention is expressed in the settlement.

(8.) Consideration moneys received for accepting surrenders of leases, by virtue of sect. 13.

(9.) Consideration moneys (if any) received for granting to copyholders, by virtue of sect. 14, licences to demise their copyholds.

(10.) Consideration moneys (if any) received upon the laying out and appropriation of streets, &c., in connection with a sale or grant for building purposes, by virtue of sect. 16.

Such appropriations are not usually made in consideration of any definite lump sum, which could be impounded as capital, but rather in consideration of the increased letting value of the houses comprised in the building scheme, which is expected to result therefrom. The Act makes no provision for any apportionment; and it seems that upon such a scheme, if effected in the usual way, the tenant for life will be under no obligation to contribute anything to capital.

(11.) Moneys raised by mortgage under sect. 18; but only for the special purposes therein mentioned.

(12.) Moneys arising from the sale of securities, in which capital moneys have been invested. (Sect. 22, sub-s. vii.)

(13.) Consideration money paid for variation or rescission of contracts, by virtue of sect. 31, sub-s. (ii.).

(14.) Money paid into Court under any statute, and liable to be invested in land as above mentioned. (Sect. 32.) This may also be dealt with in any other mode authorized by the statute under which the money is in Court. (*Ibid.*)

(15.) Money in the hands of trustees, and liable to be invested in land as above mentioned. (Sect. 33.) It is at the option of the tenant for life whether this shall be treated as capital money arising under the Act, or dealt with according to the provisions of the settlement. (*Ibid.*)

(16.) Consideration money received for the sale of interests less than a fee simple by virtue of sect. 34. This, as above mentioned, is liable to be dealt with in a special manner not applicable to capital money in general.

(17.) Three-fourths of the net proceeds of sale of timber, by virtue of sect. 35, where the tenant for life is impeachable for waste in respect of timber.

(18.) Net purchase-moneys received on a sale, by virtue of sect. 37, of chattels settled upon trust to devolve with land.

These last moneys have the peculiarity, that they may be invested in the purchase of "other chattels, of the same or any other nature" (*ibid.*, sub-s. 2), to devolve in the same manner as the chattels sold. But they may also be invested in any other way prescribed by the Act for the investment of capital money.

The foregoing enumeration of the different kinds of capital money will, of course, include any sum paid by way of deposit, upon the making of a contract by virtue of sect. 31, when such deposit will, upon the completion of the contract, form a part of any sum entitled to be regarded as capital.

It is to be observed that the foregoing enumeration comprises a great many items which were not comprised in the detailed definition of capital money originally contained in the Bill. One of these new items relates to a source introduced into the Bill by the Select Committee to which it was referred; namely, the sale of *quasi*-heirlooms.

Capital money "arising under" the Act may be paid either to the trustees of the settlement, or into Court, at the option of the tenant for life (sect. 22, sub-s. 1); but may not be paid to fewer than two persons as trustees, unless the settlement authorizes the receipt of capital trust money of the settlement by one trustee. (Sect. 39, sub-s. 1.)

In the passage of the Act last referred to, it is not clear whether the Act uses the word "trustee" according to its own definition, or according to popular usage. Capital money payable to trustees of a settlement of real property does not necessarily arise by the exercise of a power of sale; and trustees, although without a power of sale and although not specifically declared (as they could not possibly be, in the case of a settlement executed before the passing of the Act) to be trustees of the settlement "for purposes of this Act," and who would, therefore, not be within the definition given in sect. 2, sub-s. (8), of "trustees of the settlement," might, nevertheless, be authorized to give receipts for "capital trust money of the settlement." In such a case, might "capital money arising under this Act" be paid to them? and in particular, if "the settlement authorizes the receipt of capital trust money of the settlement" by one such trustee, might "capital money arising under this Act" be paid to him? These questions cannot be confidently answered.

Capital money having been discriminated from income, and being lodged either in the hands of the trustees or of the Court, the next step is to inquire what may be done with it. The following is a list of the modes, arranged in the numerical order in which they respectively occur in the Act, in which net capital moneys may be applied:—

(1.) Investment in Government securities, or secu-

rities authorized by law or by the settlement, or bonds, mortgages, debentures, or debenture stock of any railway in the United Kingdom, incorporated by special Act, and having for ten years preceding the investment, paid a dividend on its ordinary stock or shares. (Sect. 21, sub-s. i.)

(2.) Discharge of incumbrances affecting the whole estate the subject of the settlement, or of land tax, tithe rent-charge, or rents incident to the tenure. (*Ibid.*, sub-s. ii.)

(3.) Payment for any improvement authorized by the Act. (*Ibid.*, sub-s. iii.)

The list of authorized improvements is given in sect. 25; and is, somewhat abbreviated, as follows:

(i.) Drainage, including the straightening, widening, or deepening of drains, streams and watercourses:
(ii.) Irrigation; warping.
(iii.) Drains, pipes and machinery for supply and distribution of sewage as manure:
(iv.) Embanking or weiring:
(v.) Groynes; sea walls; defences against water:
(vi.) Inclosing; straightening of fences; re-division of fields:
(vii.) Reclamation; dry warping:
(viii.) Farm roads; private roads; roads or streets in villages or towns:
(ix.) Clearing; trenching; planting:
(x.) Cottages for labourers, farm servants and artisans, employed on the settled land or not:
(xi.) Farmhouses, and other buildings for farm purposes:
(xii.) Saw-mills and other mills, water-wheels, engine-houses and kilns, which will increase the value of the settled land for agricultural purposes, or as woodland or otherwise:
(xiii.) Reservoirs, watercourses, wells, shafts, dams, sluices and other works for supply and distribution of water:
(xiv.) Tramways; railways; canals; docks:
(xv.) Jetties, piers and landing-places, for facilitating transport of persons and of agricultural stock and produce, and of things required for agricultural or mining purposes:
(xvi.) Markets and market-places:
(xvii.) Streets, squares, gardens or other open spaces for the use, gratuitously or on payment, of the public or of individuals, when necessary or proper in connection with the conversion of land into building land:
(xviii.) Sewers, drains, watercourses, pipe-making, fencing, paving, brick and tile-making, and other works necessary or proper in connexion with any of the objects aforesaid:

(xix.) Trial pits and other preliminary works proper in connection with development of mines:
(xx.) Reconstruction, enlargement or improvement of any of those works.

(4.) Payment of money for equality of exchange or partition. (Sect. 21, sub-s. iv.) For this purpose also, as above mentioned, money may be raised by mortgage. (Sect. 18.)

(5.) Purchase of *the seignory of any part of* the settled land, being freehold land. (Sect. 21, sub-s. v.) As was remarked when the language of sect. 3, sub-s. (ii.), was under consideration, this seems to refer to a release of the seignory.

(6.) Purchase of *the fee simple of any part of* the settled land, being copyhold or customary land. (*Ibid.*) Here, "fee simple" seems to mean the common law fee simple, as distinguished from the customary fee simple; and the process contemplated seems to be what is commonly styled enfranchisement. For this purpose, also, money may be raised by mortgage. (Sect. 18.) It is conceived that money could not be raised by mortgage for the "purchase of the seignory" of freehold land; for the latter, being already as free as is permitted by English law, cannot be further enfranchised, and therefore such purchase cannot be described as an enfranchisement.

(7.) Purchase of the reversion in fee upon leasehold interests for years, or life, or years determinable "on life," comprised in the settlement. (Section 21, sub-s. vi.) This kind of investment will not often be to the pecuniary profit of the tenant for life.

(8.) Purchase of land, whether freehold or copyhold, held for a fee simple, or on lease with not less than sixty years unexpired, with or without minerals, and subject or not to exception of mines or mining rights. (*Ibid.* sub-s. vii.)

But capital money arising "from settled land in England" may not be applied in the purchase of land out of England, unless the settlement expressly authorizes such purchases. (Sect. 23.)

(9.) Purchase, for a fee simple or for a term with not less than sixty years unexpired, of mines and minerals convenient to be held or worked with the settled land, or of easements, &c., convenient for mining or other purposes. (*Ibid.*, sub-s. viii.)

(10.) Payment to any person becoming absolutely entitled, or *empowered to give an absolute discharge.* (*Ibid.*, sub-s. ix.) It is conceived that "empowered" here means empowered as against all parties and privies to the settlement, and that a power to give discharges in a fiduciary capacity under the settlement would not suffice.

(11.) Payment of costs, charges, and expenses of, or incidental to, the exercise of any of the powers, or the execution of any of the provisions of the Act. (*Ibid.*, sub-s. x.) This, of course, does not refer only to the payment of the costs of raising the money.

(12.) In any other mode in which money, produced by the exercise of a power of sale in the settlement, is applicable thereunder. (*Ibid.*, sub-s. xi.)

(13.) Moneys arising from the sale of personal chattels which are settled on trust, to devolve with land. Such moneys may either be treated as ordinary capital money, or they may be invested in the purchase of other chattels, of the same or any other nature, to be settled upon the same trusts as the chattels sold. (Sect. 37, sub-s. 2).

Neither a sale, nor a purchase, of such chattels may be made, without an order of the Court. (*Ibid.*, sub-s. 3.)

(14.) Capital money "arising under this Act" may also be applied in payment of any costs, charges, or

expenses, which are directed by the Court to be paid out of property subject to the settlement. (Sect. 47.) It is highly improbable that the Court will ever order any costs, &c., to be so paid which are not included under "costs, charges, and expenses of, or incidental to, the exercise of any of the powers, or the execution of any of the provisions, of this Act;" so that this mode of application seems to have been previously sanctioned by No. (11), *suprà*. It occurs as one only of a number of ways in which such costs may be satisfied, and was probably added out of abundant caution.

It is believed that the foregoing list supplies a complete account of the modes in which capital moneys arising under the Act may be applied.

(IV.) Of the Protection afforded by the Act to Remaindermen, &c.

The foregoing remarks have been chiefly directed towards those parts of the Act which tend to disregard, or thwart, what possibly may, but not necessarily must, be the wishes of the settlor. This last phrase gives a truer view of the Act's apparent policy than any phrase importing a desire to destroy settlements or to discourage the practice of making them. It seems to be the policy of the Act to cross the settlor's wishes only in so far as they are deemed, in the public interest, to be unreasonable, and to discourage only the practice of making unreasonable settlements. A great deal of trouble has accordingly been expended in providing safeguards for protecting the interests which settlements are usually designed to protect, so far as this was thought to be compatible with the Act's paramount policy. In the present section the chief part of our attention will be directed towards these last-mentioned features.

These seem to consist partly of restrictions placed

upon the tenant for life's exercise of the powers conferred upon him, and partly of precautions adapted to secure, for the benefit of the settlement generally, any proceeds which may take the shape of capital moneys.

It may be thought that some of the former are somewhat more stringent than the corresponding restrictions usually placed by the present practice upon the exercise of corresponding powers committed to the tenant for life. But the Act (sects. 56, 57) expressly provides that the powers given by the Act are cumulative, and that any settlor may confer larger powers. Settlors may therefore commit the same powers to tenants for life upon easier terms; nor was the Act under any obligation to follow any general rules which may seem to be deducible from the current practice. Its object does not seem to be either to destroy, or to supersede, settlements, but only to compel them, for the public benefit, to endure a certain measure of relaxation.

Omitting such obvious provisions as that sales, &c., shall be made at the best price, &c., that can reasonably be obtained, the following seem to be the principal safeguards designed by the Act for the protection of remaindermen in general:—

(1.) The tenant for life, when intending to make a sale, exchange, partition, lease, mortgage, or charge, must give a month's previous notice of such intention to each of the trustees of the settlement, and also to "*the solicitor for the trustees*," if any such solicitor is known to him. (Sect. 45, sub-s. 1.) The phrase in italics is somewhat ambiguous. The solicitor ordinarily employed by trustees does not thereby become their general agent for the purpose of receiving notices. (*Saffron Walden Second Benefit Building Society* v. *Rayner*, 14 Ch. D. 406.) It is probable that the phrase, "the solicitor to the trustees," is here used in a loose popular sense. But

it will be a prudent precaution for trustees who wish to exercise with strictness their powers of supervision, expressly to appoint from time to time a solicitor to be their agent to receive such notices as above mentioned, and to give written notice of every such appointment to the tenant for life.

It will be observed that the enumeration in sect. 45, of powers requiring for their exercise this preliminary notice, does not exhaust the list above given of powers which may be exercised by the tenant for life. It omits (i.) the acceptance of surrenders, (ii.) the granting of licences to copyholders to make leases, (iii.) the appropriation and laying out of streets, &c., in connection with a building scheme; (iv.) it seems to omit the application to the Court for an order to cut timber, under sect. 35; but the order would, of course, not be made without a sufficient notice, probably not shorter than the prescribed month, to the trustees; and (v.) it omits the making, varying, and rescinding, and accepting surrenders of contracts, by virtue of sect. 31.

The peculiar language of sect. 3, sub-s. (ii.), "may *sell* the seignory," &c., upon which some remarks have been made above, may possibly have been adopted in order to bring the matters there treated of within the list of matters now under consideration. If this was the intention, it might easily have been accomplished by a more perspicuous method.

It is expressly provided that, "at the date of notice given," the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement. (Sect. 45, sub-s. 2.) From this it seems clearly to follow, that the powers of the tenant for life cannot (in the absence of such a "contrary intention") be exercised unless there are two trustees.

A correspondent has suggested, in a letter to a legal journal, that a difficulty may arise in the case of a

tenant by the curtesy, who, as we have seen, has the powers of a tenant for life. In the case of a tenant by the curtesy there are ordinarily no trustees. Probably, as was suggested in the above-mentioned letter, the tenant by the curtesy will be obliged to procure the appointment of trustees, or rather, persons to act in that capacity, by virtue of sect. 38.

The same difficulty may arise also with regard to several of the limited owners enumerated in sect. 58, sub-s. (1); to whom, though not in fact tenants for life under a settlement, are committed "the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act." The case of a tenant by the curtesy is perplexed by the additional complication, upon which some remarks have been made above (p. 13), that no "instrument" exists which can be made to do duty for a settlement within the meaning of sect. 58, sub-s. (2).

A person dealing *in good faith* with the tenant for life is not *concerned to inquire* respecting the giving of any such notice. (Sect. 44, sub-s. 3). But it is conceived that no person having actual notice of any default could safely deal with the tenant for life.

(2.) Sect. 44 provides that, if, at any time, a difference arises between the tenant for life and the trustees respecting the exercise of the powers "of this Act," the Court may, on the application of either party, give directions respecting the matter. This doubtless supplies the motive for the month's notice to the trustees prescribed by sect. 45. Such applications are to be made either by petition or by summons at chambers. (Sect. 46, sub-s. 3.)

(3.) Capital money must be paid either to the trustees or into Court, at the option of the tenant for life. (Sect. 22, sub-s. 1.)

Unless the settlement authorizes the receipt of capital trust money by one trustee, such payment may not be made to fewer than two trustees. (Sect. 39, sub-s. 1.) Some remarks (*suprà*, p. 36) have been already made upon the ambiguity of the word "trustee," as it is used in this passage.

There is some reason to fear that the practical efficacy of this provision may be impaired by sect. 41, which enacts that each trustee is answerable for what he actually receives only, notwithstanding his signing any receipt for conformity. This enactment, together with the rest of the section in which it occurs, follows the terms of the "trustees' indemnity clause" usually inserted in settlements. But it must be remembered that the powers given to the tenant for life by the Act are more extensive than those usually given by settlements to the tenant for life and trustees together. Sect. 41 makes it possible for what may be styled the precautionary supervision over the tenant for life, so far as it relates to the receipt and custody of capital money, to fall into the hands of a single trustee.

So far as regards the general exercise by the tenant for life of his statutory powers, the Act provides that the supervision of the trustees shall be purely voluntary on their part. It would be difficult to frame a larger indemnity to them in this respect than that contained in sect. 42. The burden of finding people willing to carry out his wishes is not unreasonably thrown upon the settlor. Few people would be willing to accept the ordinary responsibilities of a trustee with regard to the exercise by the tenant for life of his statutory powers.

(4.) Care has been taken to provide that, as regards the execution of authorized improvements, capital money shall be expended only upon such as are judicious and

likely to be remunerative. If the money to be expended is in Court, the application of it will be governed entirely by the Court's discretion. (Sect. 26, sub-s. 3.) If it is in the hands of the trustees, the improvement must be executed according to a scheme to be approved by the trustees; and before the money is paid out of their hands, an order of the Court must be made, or a certificate of the due execution of the work must be given, either by the Land Commissioners, or by a "competent engineer or able practical surveyor" nominated by the trustees and approved by the Commissioners or the Court. (*Ibid.*, sub-s. 2.)

The Land Commissioners are the aggregate of the Inclosure Commissioners, the Copyhold Commissioners, and the Tithe Commissioners; who (sect. 48) are united into a single body by the name of the Land Commissioners for England, and are referred to throughout the Act by the shorter title of Land Commissioners. (Sect. 2, sub-s. x.)

(5.) The responsibility of maintaining improvements executed under the Act is thrown upon the tenant for life and "each of his successors *in title* having, under the settlement, a limited estate or interest only in the settled land" during such time as the Land Commissioners shall prescribe. (Sect. 28, sub-s. 1.) The words printed in italics (which are repeated elsewhere) are, of course, due to an oversight. The tenant for life, and each of his successors, being limited owners, must also keep insured against damage by fire any buildings of an insurable nature comprised in the improvement. (*Ibid.*) Trees planted as an improvement may not be cut down, except in proper thinning. (Sect. 28, sub-s. 2.) If required by the Commissioners, either upon their own motion or upon the suggestion of any person having

any interest in the settled land, the limited owner for the time being in possession must "report to the Commissioners the state of every improvement executed under this Act, and the fact and particulars of fire insurance, if any." (Sect. 28, sub-s. 3.)

(6.) The trustees, as we have seen, are relieved from all responsibility, so far as regards any supervision which they have power to exercise over the tenant for life; but it is provided that the latter shall, in exercising any power under the Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties. (Sect. 53.)

The general conclusion seems to follow from the above-mentioned provisions that if trustees of settlements are willing in the future to take the same degree of care which they have generally been found willing to take in the past, the operation of the Act will not seriously affect the stability and general efficacy of settlements. But it must be remembered that in future, so far as the scope of their duties is enlarged by the Act, this care will be undertaken voluntarily, and not, as is the case with regard to their ordinary duty as trustees, subject to liability for breach of trust if they are negligent. It therefore remains to be seen whether the prospect of immunity will breed carelessness. If any such result should follow, the blame may fall more justly upon those classes who are chiefly concerned with the settlements which we have been considering, than upon the Act.

The foregoing remarks have not attempted to include every detail of the Act's provisions, which would have been impossible within the space which they have occupied; but only to offer to the busy reader, who has no leisure to sift out for himself an extensive and complicated measure, a broad view of the principal lines of the Act's policy. It is hoped that they will be found not altogether useless to that end.

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